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February 6, 2004

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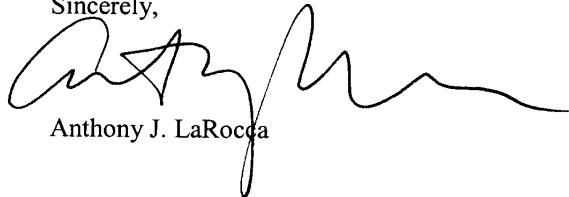
Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, NW  
Washington, DC 20423

Re: **Otter Tail Power Company v. The Burlington Northern and  
Santa Fe Railway Company, STB Docket No. 42071**

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter on behalf of defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") are the original and ten copies of Defendant's Motion to Modify Procedural Schedule. Please note that BNSF is requesting expedited consideration of this motion in light of the fact that the current procedural schedule calls for the submission of supplemental reply evidence on February 23, 2004, just over two weeks from today.

Sincerely,



Anthony J. LaRocca

cc: Complainant's Counsel

WASHINGTON

PHOENIX

LOS ANGELES

LONDON

BRUSSELS

EXPEDITED CONSIDERATION  
REQUESTED

BEFORE THE  
SURFACE TRANSPORTATION BOARD

OTTER TAIL POWER COMPANY,

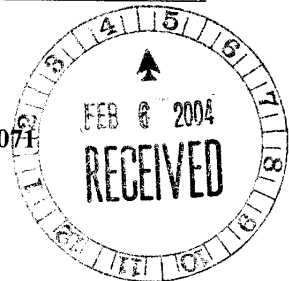
Complaint

v.

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY

Defendant.

Docket No. NOR 42071



**DEFENDANT'S MOTION TO MODIFY**  
**PROCEDURAL SCHEDULE**

Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby requests that the Board modify the procedural schedule in this proceeding to provide BNSF with an opportunity to address in its supplemental reply evidence an issue regarding rerouted traffic in light of the Board's recent decision in *Duke Energy Corp. v. CSX Transportation Inc.*, STB Docket No. 42070 (served Feb. 4, 2004) ("*Duke v. CSX*"). BNSF requests that the due date for BNSF's reply to Complainant Otter Tail Power Company's ("Otter Tail") supplemental version of its opening evidence be extended four weeks – until March 22, 2004 – and that the Board extend the schedule for the filing of final rebuttal evidence by a corresponding four-week period – until April 22, 2004. BNSF also seeks expedited consideration of this request since the current schedule calls for the submission of supplemental reply evidence on February 23, 2004. The grounds for this request are explained below.

In *Duke v. CSX*, the Board clarified and elaborated upon its standards governing the inclusion of rerouted traffic in the traffic group of a stand-alone railroad. The Board reiterated

that “for reroutings that would result in a longer overall haul, the rebuttable presumption is that the longer route is less efficient.” Slip op. at 16. More significantly for purposes of this motion, the Board also held that:

[I]t is not appropriate to divert traffic from other parts of the defendant carrier’s system to help defray costs for the portion of the system used by the complainant. Thus, where traffic does not already utilize lines replicated by the SARR, the traffic may not be included in the SAC analysis absent a compelling justification that the defendant carrier should itself be routing the traffic in this manner and that it is inefficient for it not to do so.

*Id.* at 16-17. The Board reasoned that inclusion of traffic “that would not, under its customary routing, use any lines included in the SARR” is inconsistent with the SAC test “as revenue from traffic that bears no relation to the SARR network should not be used to pay for that network.”

*Id.* at 16.

The Board’s clarification of when rerouted traffic may be included in a stand-alone traffic group has significant implications for this case. Otter Tail acknowledged on opening that much of the non-coal traffic transported by the OTRR was rerouted over a route 101.1 miles (26%) longer than the route it traverses in the real world. According to Otter Tail Opening Exhibit III-A-3, this rerouted traffic accounts for approximately \$144.2 million of the SARR’s total revenue.<sup>1</sup> On Reply, BNSF excluded a portion of this traffic that was transported on BNSF’s highest-priority intermodal trains because the evidence clearly demonstrated that the stand-alone railroad could not meet the service commitment standard established by the Board in *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry.*, STB Docket No. 42056 (served Mar. 24, 2003). BNSF did not seek to exclude the other rerouted non-coal traffic at that

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<sup>1</sup> See *id.* at 21 and 26 (specifying total revenues for Fargo to Snowden and Snowden to Fargo non-coal traffic).

time because the Board had not yet articulated the test for exclusion of rerouted traffic set forth in *Duke v. CSX*.

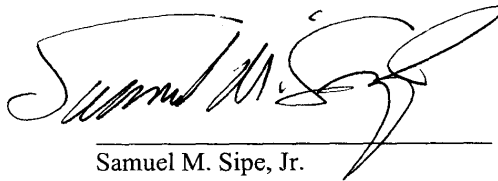
All of the traffic rerouted by Otter Tail should be excluded from the SARR traffic group since it does not satisfy the test articulated by the Board in its *Duke v. CSX* decision. While BNSF could easily determine how much revenue should be excluded prior to the current February 23 filing deadline for its supplemental reply evidence, it would not be possible for BNSF to determine by that date what corresponding reductions in costs should be made. BNSF will need to do significant work to determine what changes are required to yard and line capacity, construction costs, operating costs, personnel, and equipment for a railroad that would transport a lower volume of traffic.

Permitting BNSF additional time to submit a revised traffic analysis is particularly appropriate in this case since the Board has already afforded Otter Tail the opportunity to modify its coal traffic assumptions in light of new Board precedent. As the Board stated in its November 21, 2003, decision that granted Otter Tail's request to supplement its traffic group, "Allowing the parties here to address new issues raised by recent decisions is reasonable because it will provide the Board with more relevant evidence and allow it to apply recent precedent." November 21, 2003 decision at 1. The Board's reasoning applies with equal force here where BNSF seeks to address the rerouting issue in light of the Board's *Duke v. CSX* decision. Moreover, a grant of BNSF's motion will not require any additional filings, as Otter Tail will have an opportunity to respond to BNSF's evidence on the rerouted traffic in its rebuttal filing.

For the foregoing reasons, BNSF requests that the Board extend the period for BNSF's reply to Otter Tail's supplemental evidence to March 22, 2004. In addition, the Board should extend the date for final rebuttal evidence by a corresponding period to April 22, 2004. BNSF

also requests that the Board give this motion expedited treatment as the current deadline for BNSF's supplemental reply evidence is February 23, 2004. In light of the tight deadline, Otter Tail should file promptly any reply to this motion.<sup>2</sup>

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Samuel M. Sipe, Jr.', written over a horizontal line.

Samuel M. Sipe, Jr.  
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ATTORNEYS FOR DEFENDANT

February 6, 2004

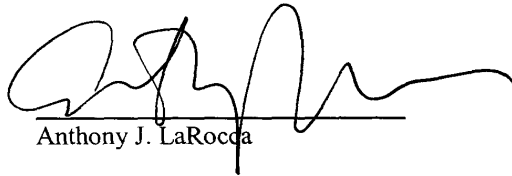
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<sup>2</sup> BNSF responded to Otter Tail's November 2003 motion within four days.

**CERTIFICATE OF SERVICE**

I hereby certify that this 6th day of February, 2004, I served a copy of the foregoing  
Defendant's Motion to Modify the Procedural Schedule by hand delivery to the following:

Nicholas J. DiMichael  
Jeffrey O. Moreno  
Michael H. Higgins  
Thompson Hine LLP  
1920 N Street, NW  
Suite 800  
Washington, DC 20036



Anthony J. LaRocca